**LABOUR LAW, CAPITALISM, AND THE JURIDICAL FORM: TAKING A CRITICAL APPROACH TO QUESTIONS OF LABOUR LAW REFORM**

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*ABSTRACT*

This paper seeks to demonstrate the potential contribution that critical labour law scholarship can make to our understanding of some of the practical problems, such as the problem of personal scope, facing labour law today. The article argues that, in order to do this, critical labour law scholars need to closely engage with questions about labour law’s socio-economic function, and, in turn, the socio-economic function of its *juridical form.* Having shown the importance of engaging with these issue for the development of a practically useful critical, theoretical position, the article shows how we can use this critical understanding of law, and labour law, to inform our interventions in contemporary debates about labour law’s personal scope.

**1. INTRODUCTION**

What makes labour law scholarship critical in orientation? On the one hand, labour law scholarship might be critical in a narrow sense - critical of various observed socio-economic outcomes, seeing labour law as a, or the principal, mechanism via which to change or improve those outcomes. On the other hand, however, labour law scholarship might be critical in a much deeper, more fundamental sense, critical in the sense implied by critical scholars such as Sinzheimer, and Kahn-Freund: critical not just of socio-economic outcomes, but of the structures that give rise to and explain those outcomes - including the role within those structures of law.[[2]](#footnote-2) While the former approach tends to focus its attention on short-term goals, improving workers’ terms and conditions of work, the latter places more emphasis on the longer-term goal of structural transformation.[[3]](#footnote-3)

It is this latter, deeper, understanding of the critical nature of labour law scholarship that underpins this article, the purpose of which is to explore how critical labour law might develop a critical theoretical position capable of informing practical interventions into popular debates about labour law reform, with a particular focus on the debate about labour law’s personal scope. In order to do this, the article argues in favour of a deeper engagement with labor law’s socio-economic function, and relatedly, closer attention to questions of *juridical* form. In order to explain the distinctiveness of this approach, the next section briefly explains the methodological perspective underpinning the article.

2. **Methodological Considerations**

The analysis of law, and labour law, developed in the first half of this article proceeds at the structural level, and so, is not concerned with specific legal rules, or the outcomes of specific decisions. Rather than associating labour law with a determinate body of rules and protection, then, it adopts a perspective on labour law that views the latter through the lens of the function, presupposed by capitalism, that such rules and protections can be said to have evolved to perform; the ever-changing legal and empirical manifestation of a function that is necessary to, and presupposed by, capitalism and its sustainable reproduction.

By taking such an approach, the article is able to distinguish between an abstract conception of labour law’s function, informed by an analysis of what labour law does, but also, what capitalism *requires*, and the concrete mechanisms - the actual laws and institutions - through which that function comes to be performed (however imperfectly) in different historical contexts. Importantly, these mechanisms may or may not correspond with the division of legal disciplines (between labour law, social security law, intellectual property law, competition law); legal measures that might conventionally be attributed to intellectual property law, for example, could nonetheless be seen as contributing to the performance of labour law’s function (such as minimum remuneration rights for copyright), and would, then, be understood as one of the latter’s historical manifestations.

To develop such a functional analysis is not to suggest that concrete labour law rules respond in some pre-determined fashion to certain social or economic ‘demands’[[4]](#footnote-4). Rather, it is to suggest that the existence of the rules and institutions commonly associated with labour law can be explained as historically evolved responses to certain recurrent dilemmas, or problems, inherent in capitalism and in the unique relations that are intrinsic to it.[[5]](#footnote-5) This allows us to understand labour law as possessing a distinct ‘logic’, and to explore how this logic itself might structure socio-economic practices. By implication, then, this functional understanding of labour law does not deny the role of human agency in shaping how law, and society, develops, nor the critical role of the class struggle in shaping the precise dynamics of legal, and economic, development. Rather, it is to adopt a methodology perspective whereby social and legal change is conceptualised as the outcome of class struggle, where this struggle is understood as a manifestation of the subjective, and contingent, articulations and interpretations of the objective conditions in which individuals find themselves, conditions which shape not only the options available to individuals, but also, how they understand what it is possible, necessary, and worthwhile to do.[[6]](#footnote-6) Thus, while labour law can indeed be seen as the product of class conflict, and thus, political ‘compromise’, that compromise must be recognised as being forged within a set of historically specific structures and conditions that profoundly influence what is fought for and how, as well as what sort of compromises are deemed possible, and acceptable, in different contexts.

By drawing on this functional understanding of labour law to explore the question of labour law’s personal scope in the second half of this article, the article is not arguing that an analysis of labour law’s function can tell us to what sort of working relationships a specific rule, or labour law policy, should apply. Rather, it is arguing that we can identify certain distinguishing features of the sort of working relations to which labour law’s function is directly relevant, and integral, it being a practical, and somewhat historical, question, exactly how that function is operationalised in practice.[[7]](#footnote-7) These rules, and protections, may take the form of statutory employment rights, or so-called ‘social legislation’, but equally, they could be expressed in other regulatory mechanisms, such as intellectual property law; competition law; tax law etc.[[8]](#footnote-8) They gain a coherent identity, however, from the particular function they are harnessed to perform, a function which is uniquely relevant, and integral, to a particular *form* of working relationship, and indeed, to a particular *mode* of exploitation. This allows us to compare this abstract conception of labour law’s ‘proper’ sphere of concern, with the different ways in which that scope comes to be circumscribed, and contextualised, in different contexts, in practice. As we shall see, in taking this approach, we make possible critical interventions in contemporary debates that are informed, and guided by, our broader critical theoretical position, and our wider, long-term-goal, of structural change.

In order that our critical theoretical position be capable of informing our short-term interventions into debates about labour law reform, it is imperative that critical labour law scholars take seriously the insights of the theory of the legal form. This theory, presented in detail in sections 4 and 5 below, explains how, and why, law fails to engage with the structural causes of contemporary social problems, such as exploitation, and why this means that systematic, or structural change, cannot, or cannot directly, be realised *through law.* In this respect, it will be shown, law is both too abstract, decontextualising social relations, and too specific - too focused on specific outcomes, struggles, or disputes - to engage with the structural causes, and origins, of the problems which labour law is often invoked to address, making structural change *through* law extremely difficult. The penetration of the law in socio-economic practices is such, moreover, that its limits make themselves felt not only in their influence on juridical interpretation, but also, in the way that it frames, and establishes the terms on which public political debate takes place. This suggests that intervening in contemporary struggles over labour law reform will only be compatible with, or conducive to, our long-term structural goals, if we are able to engage not only with the structural causes of exploitation, but also, the complex ways in which those structures are obscured, legitimised, and sustained, through law.. Exactly what this might imply vis-a-vis how we approach efforts to ‘reform’ labour law’s personal scope, will be explored in detail in section 5 of this paper.

The rest of this article proceeds as follows. Section 3 will explore the distinguishing features of capitalist work relations, and the form of exploitation that is intrinsic to it, and the role of law in producing, and sustaining, that exploitation. It will move from here to engage more specifically with the role of labour law, and its relationship with these legal structures of exploitation. Section 4 will draw on the theory of the legal form to shed more light on labour law’s function, and the limits that exist when it comes to how well it performs this function in practice. Section 5 then shows how we might use our critical theoretical position to better understand current debates about labour law’s personal scope. Section 6 will then show how this critical position can be used to frame a ‘tactical intervention’ into such debates that is consistent with, and does not undermine, our wider structural goals. Section 7 will conclude with some observations about the implications of the analysis in this article for critical labour law theory and practice.

**3. LABOUR LAW’S FUNCTION: CONCEPTUALISING CAPITALIST WORK RELATIONS**

The first fundamental thing to note about capitalist work relations is that they are, by definition, and of their very nature, juridical relations: they arise from a free agreement between legal equals, an exchange of labour power for wages. It is the legal right to the product of labour, and the legal right to the wage, that gives rise to the distinctive struggle, over surplus and subsistence, at the heart of capitalist work, and thus, its unique form of exploitation. By reason of the legal form of the work relation, capital need not appropriate surplus labour from workers by force; the possibility of ‘capturing’ the surplus produced by workers in the production process is provided by the legal right an individual has to appropriate the *entirety* of the labour product.

As the scholar Karl Renner implicitly notes, in itself, the contractual form of work relations is relatively insignificant (after all, work arrangements in feudal times were also often based on contract), or it would be, but for the wider social, and legal, environment in which those contracts are concluded.[[9]](#footnote-9) Because, in capitalism, the contract for work is concluded in a context in which the legal institution of private property systematically excludes workers from the means of production and subsistence, *in capitalism,* the contractual form allows for the exercise of the social power of capital over workers in production - it acts, in other words, as a mechanism of exploitation.[[10]](#footnote-10)

In order to understand *how* this is so, and thus, to appreciate the significance of law as a structure of exploitation, a closer attention to Marxian political economy is required. Importantly, Marx uses the term exploitation in a quite distinct way.[[11]](#footnote-11) He does not deny the existence of other forms of exploitation (such as taking advantage of a person’s weakness with a view to personal gain) to refer to the process by which surplus labour is extracted from workers. This ‘economic’ form of exploitation takes different forms in different modes of production; in capitalism, it is expressed in the possibility for extracting surplus value from labour (conceived in the aggregate) deployed in the production of commodities[[12]](#footnote-12), a possibility referable to the fact that, at a systemic or societal level, capitalism presupposes a class of workers dependent on selling their labour power to live (a working class), and a class of capitalists able to employ those workers to produce commodities, the collective value of which exceeds the costs of reproducing the workforce hired to produce them.

It is important to note at this point that nothing in this theory of exploitation, inseparable from the Marxian labour theory of value, suggests that each individual firm will pay workers a ‘subsistence wage’ in practice.[[13]](#footnote-13) Employing workers below the costs of subsistence and/or keepinglabour costs to a minimum by depressing working conditions, may often prove an effective strategy for individual firmsto pursue with a view to boosting profits, particularly in the short-term. In this context, firms are indeed extracting surplus labour from workers, paying them less than the value of their labour power *to the firm*, but they are not necessarily producing any value. One of the key insights of the labour theory of value, then, and a point we will return to below, is that, in the long-term, and if generalised to the level of the economy as a whole, these ‘profitable’ strategies will be unsustainable, for they will erode the very foundations, or conditions, on which capital accumulation, and surplus value production, depends.[[14]](#footnote-14)

Engaging with the distinction between surplus value and profit, between the costs of societal reproduction (the value of labour power/subsistence) and the wages of individual workers, is extremely important for understanding the contradiction at the heart of the capitalist mode of production - between the competitive strategies through which surplus value is pursued, and the wider conditions that are required to sustain it.[[15]](#footnote-15) This contradiction is given concrete form, and comes to be expressed, through the class struggle. This refers to a struggle, at the macro level, by labour, to increase (through campaigns to limit the length of the working day and/or raise customary standards of living) the value of labour power, and by capital to reduce the value of labour power, (via mechanisation, deskilling, rationalisation etc), that is a struggle over the ratio between paid and unpaid labour time (necessary and surplus labour); and a struggle that takes place at the level of an individual working relation, a struggle by individual workers to maximise *their* wages, and improve *their* working conditions, relative to the amount of work *they* expend, and by individual firms to increase the amount of unpaid labour they extract from their own workers (even if this means depressing wages below subsistence level), with a view to boosting profits.

Capitalist work relations are relations in which both dimensions of this struggle necessarily intersect: the ratio between paid and unpaid labour time at the macro level (the rate of surplus value production), is conditioned by the struggle that takes place between individual workers and firms over wages and working conditions, and thus, over surplus and profit.[[16]](#footnote-16) While it is possible for the wages of individual workers to dip below subsistence level *in the short term,* the effect of competition is that any ‘cost-saving’ or ‘productivity enhancing’ step taken by one firm, tends to become generalised. As such, by depressing the wages of one group of workers, firms’ exert a downward pressure on the wage rate, and thus, workers’ living standards.[[17]](#footnote-17) Workers’ struggles over the terms of their own wage-effort or wage-work bargain, then, are necessarily part of the *social* struggle over surplus and subsistence - over paid, and unpaid, labour time - that ultimately shapes the dynamics of capitalisms’ development, and through which the process of capital accumulation also plays out.

Both dimensions of the struggle over surplus and subsistence have their origins in the capitalist class structure: in the exclusion of the direct producers from access to the means with which to produce, or access, their subsistence (which, in capitalism, assumes the form of money) and the resulting dependence of those producers, on capital (the class in possession of those means) in order to live. It is this class dependence that provides the basis for capital’s power to dictate the overall purpose and orientation of production, the terms on which commodities will be sold, and thus, to press the labour power of society into the services of accumulation. This power is not, or not necessarily, exercised via a contract with a particular worker, but, indirectly, through the ‘coercive’ mechanism of competition[[18]](#footnote-18), in which the legal institutions of contract, and private property, are implicit. While a contract between a firm, and worker, is necessary for any surplus value produced to be ‘captured’ with a view to boosting profitability, capital’s power over labour is, and can be exercised before any such contract is even concluded: before an inter-personal relation between an individual employer and employee has come into existence. This is so notwithstanding that the existence of such a relation is a precondition for the allocation of legal rights and obligations between the parties.

The competitive process through which this social power is expressed is constituted by law. That is, the ‘free market’ is not a spontaneous product of individuals ‘natural’ proclivity to engage in exchange but emerges only in a context in which one class is systematically excluded from access to the means of subsistence, and so, is dependent on selling their labour power to those in possession of such means to live. It is in this sense that we can say that the free market itself *implies* unequal strength between classes, acting to *enforce* the power of capital over workers, and society - to press society’s resources into the services of accumulation.[[19]](#footnote-19) To the extent that legal institutions, such as property and contract, are essential to the constitution and operation of these free markets - externalising coercion, guaranteeing predictability and stability of exchange, while, at the same time, securing property rights - law is an inherent part of the structures through which capital’s power is exercised, and its unique form of work constituted: one of capitalism’s ‘structures’ of exploitation.

The same legal structures that provide the foundations for surplus value production, and thus, exploitation, provide the conditions of possibility for the competitive process through which those foundations tend to be undermined.[[20]](#footnote-20) As we have seen, in capitalism, surplus value production is simply the by-product of the competition between firms for maximum profits, and the competition between workers for maximum wages. It is with profit, not surplus value, with which each individual firm is ultimately concerned, then, and it is with wages and working time, not with overall living standards, with which individual workers are immediately concerned, when making decisions in the market. As a result, the competitive process through which the collective goal of capital accumulation is pursued creates a prisoners’ dilemma situation that encourages workers *and* firms to act contrary to their long-term interests: competition encourages workers to accept wages below subsistence level, to under-cut each other in the market; and firms to take advantage of the *personal* dependence of *their own workers,* to boost their own profits, in a way that potentially undermines the wider conditions for sustainable accumulation. This might be by depressing the wages of their own workers below subsistence level, by refusing to pay the taxes required to reproduce the infrastructure through which commodity production and exchange takes place; and/or by adopting production techniques and working conditions which interfere with the processes required to secure social reproduction.

It follows that tthe same institutional structures which provide the basis for capital accumulation, then, generates tendencies towards actions and decisions that lead to a deterioration in the value (and value-creating capacities) of labour power, with the result not only that workers’ living standards are depressed, but also, their capacity to produce is diminished. In such a context, the dominant behavioural effects of the pressures of competition actually become negative, or obstructive, for capital - or rather, for capitalism *as a system* - shortening the length of workers’ lives, creating resistance, reducing skills/productivity etc.[[21]](#footnote-21) Without mechanisms capable of counterbalancing these negative tendencies - *mediating* the struggle over surplus and subsistence, then, placing *limits* on the scope of exploitation - the *necessary* imperative to exploit which capitalistic structures create, will produce tendencies towards *over-exploitation* (and thus, unsustainable levels of inequality) that are harmful in the long-run. Harmful, that is, in terms of impeding capital accumulation, and also, by implication, social reproduction.

Performing this function, mediating this struggle, so as to ensure the material conditions for capital accumulation is the historically evolved function of labour law. Importantly, however, in performing this function, in limiting exploitation, labour law is not acting *against* capitalism, but is acting *in support of it*.[[22]](#footnote-22) That labour law mechanisms are, in practice, the spontaneously evolved outcomes of the class struggle emphasises that the class struggle is *itself* a struggle generated *within* capitalism, a struggle by labour, against capital, but *within* the structures of capitalism: a struggle not *against* the necessity to work, but a struggle over the terms on which that work is sold and/or performed. Legal mechanisms and reform that focus exclusively on this struggle, as labour law tends to do, thus implicitly take for granted the very structures that give rise to that struggle in practice.

Failing to grasp the immanence of this struggle, and of labour law, in the capitalist class structure has tended to present an overly optimistic view of labour law’s capacity for structural change - for not merely limiting exploitation, but for transcending it. Insofar as labour law continues to fight against exploitation, rendering it socially and economically sustainable, labour law helps perpetuate the very structures through which that exploitation takes place. It may be a weapon deployed by labour against capital, then, but as Karl Korsch’s work implies, in deploying that weapon, labour law is actually acting in the wider interests of capitalism as a system.[[23]](#footnote-23)

This perspective offers an important corrective to aspects of critical labour law scholarship, such as the influential work of Karl Renner, and to some extent too, the works of Otto Kahn Freund and Sinzeheimer, influenced by it. Like many critical scholars, Renner argued that labour law (or rather ‘social law’) had modified the ‘exploitative’ effects (or social function) of the contract for work, ‘socialising it’, and in this way, changing its ‘social function’.[[24]](#footnote-24) While the social function of this contract may once have been to subordinate labour to capital’s command, and in so doing, facilitate the extraction of surplus value, then, the linking of that contract with various social and employment rights had the effect of changing the nature of that function.

What this view overlooks, however, is that the linking of the contract of employment with various employment and social rights is itself entirely consistent with the basic ‘logic’ of capitalistic exploitation. As such, it actually helps to sustain, and legitimise, the function that the contract has always performed in the context of capitalism - facilitating and enabling exploitation. In effect, Renner confuses here the social *function* of the contract of employment, which is a product of its legal form, with the socio-economic *implications* or empirical *effects* of that contract, in the particular legal and social context in which it exists (the precise configuration of capitalism at a given time). In order to better understand the significance of the social function of the contractual form of work, we thus need to take a closer look at questions of legal form.

*4. THE JURIDICAL FORM*

To speak of the juridical form in this way is to recognise that law constitutes capitalism not only in a material sense, but also, cognitively. In order for political arguments to find legal expression, they must be structured in a way that makes sense to the legal system: translated into legal language. For example, in order to decide if a given social relationship meets the legal criteria for employment, that relationship must be given expression in a form that makes sense to the legal system: in a juridical form. One of the central observations of the theory of the juridical form, particularly as developed in the works of the Marxist legal scholar Evgeny Pashukanis, is that law structures social reality in a very particular way: as a web of juridical (consensual) relations between equal, and autonomous, legal subjects. This is not, however, a passive exercise, but a constitutive one: because of the immanence of law in socio-economic practices, and the necessity to rely on legal norms and legal institutions in every-day behaviour, the law’s particular conception of socio-economic reality both reflects, *and shapes,* that reality, influencing how society is conceived by individuals, and thus, what it is deemed possible, necessary, and legitimate, to do.

The theory of the juridical form is not, then, simply an analysis of the internal structure of legal discourse. It is an explanation of that structure, and an analysis of its function, and significance, in the context of the social practices and relations to which it is specific. To speak of the juridical form, then, is actually to refer to the historically specific form which social relations assume in the context of capitalism, to a specific social relation. In the context of commodity exchange, individuals assume the form of juridical subjects, as bearers of rights and obligations, and thus, as capable of engaging in a free (and equivalent) exchange. The process by which individuals assume this form parallels the process by which the products of labour assume the form of commodities (exchange values), and thus, by which they enter into relations of equivalence in the context of the market. In the same way that all qualitative differences between labour products are negated in the act of commodity exchange, coming to relate with each other only as different quantities of a single, homogenous, substance (value), so too are all the qualitative differences between individuals negated as they participate in exchange, as they face each other as individuals equally capable of owning, and alienating property - as equals before the law.

In such a context, the context of the practices of commodity exchange, the freedom and equality of the individual, and thus, the consensual nature of any exchange between them, is only sustained insofar as any constraints on their behaviour are assumed to apply equally, and neutrally to all, and insofar as the authority before whom they enforce their rights, appears as impartial and independent, as separated or autonomous from the market, and from the parties’ ‘freely entered’ relations. This imposes on juridical interpretation requirements for consistency and neutrality that tend towards a self-referential,[[25]](#footnote-25) and incremental approach to legal change, and this means that political objectives can only be given juridical effect if translated in, and through, the language, and ‘technologies’ of law.

This observation is important because many of the social problems with which ‘progressive’ lawyers are confronted - exploitation, inequality, poverty etc - cannot be traced to the decisions of individuals, but are manifestations of wider structures. And legal discourse is simply too abstract to engage and deal with these structural issues.[[26]](#footnote-26) Legal discourse can only ‘see’ social relations as inter-personal relations between formally equal individual subjects; and it is their actions, and decisions, rather than the structures framing and explaining those actions and decisions, which are decisive for the purposes of law.[[27]](#footnote-27) Thus, as law resolved legal disputes between subjects, or ‘addresses’ social problems, it does so without every touching, or engaging with, the logics, and structures, which shape and condition their actions.

Pashukanis’ analysis is also extremely important for helping us to understand the *embeddedness* of the juridical form in the practices and relations through which capitalism is reproduced: the market.[[28]](#footnote-28) This implies a symbiotic relationship between the form, and structure, of law, and the practices of commodity exchange that it constitutes, and regulates. It is not simply that exchange depends on stable property rights, and enforceable contracts; it is that a particular set of beliefs about the world, about the nature of individuals, and their relations with each other, and to legal and political authority, are integral to the practices of commodity exchange in the sense that without them, they cease to be. These beliefs find their expression in the legal rules and institutions that develop to regulate and facilitate those practices, and it is only because and to the extent they do so that these rules and institutions are perceived as legitimate, and capable, in practice, of influencing behaviour - as *law*.

Given the immanence of the juridical form in the practices of commodity exchange, the freedom and equality of the individual comes to be taken for granted in the context of capitalism, as does the idea that the legitimacy of legal and political authority is linked with its independence, and neutrality, vis-a-vis its subjects. As capitalism develops, the laws and institutions that evolve to regulate and structure socio—economic relations come, increasingly, to assume a juridical form, to take as given, and reinforce, the freedom and equality of the subject and the basis of the legal system’s own legitimacy in the free consent of its subjects, in its willingness to act in, and uphold, the ‘equal’ interests of all.[[29]](#footnote-29) Thus, while we might still say that law is constitutive of capitalism in the sense that the institutions of private property and contract are essential to the processes by which capitalist social relations come to be, and are systematically reproduced; contract, in the context of capitalism, itself assumes a particular form, expressing the autonomous will of free, and equal subjects, equals before the law. There is no connotation of hierarchy, as there is in the context of contract in feudal society, therefore, and the basis of the parties’ rights and obligations are deemed to arise from their own autonomous will (and/or the will of the State as the representative of the general interest), rather than from their status or social position.

The practices of commodity exchange to which the juridical form is integral are specific to capitalist societies, and thus, to societies based on commodity production. They thus presuppose the capitalist class structure that makes possible surplus value production, and thus, the exploitation of wage-labour.[[30]](#footnote-30) Insofar as labour law - concrete employment rights - are expressed in and through the juridical form, therefore - and thus, they presuppose the formal freedom and equality of the subject - they *express,* rather than contradict, the logic of capitalist society, and in so doing, help perpetuate the assumptions intrinsic to the very structures of exploitation they attempt to limit, or change. Nonetheless, the origins, in the capitalist class structure, of the historically specific beliefs that are embedded in laws and institutions, remains obscured in legal discourse, just as they do in the context of the practices of commodity exchange to which they are integral. As such, their relationship with the inequality and exploitation implied by that structure remains obscured.

In practical terms, the existence of this contradiction is such that the legal system is constantly confronting situations that reveal facts about the world that are contradicted by the particular form in which they must be conceptualised and expressed in law if they are to form an object of regulation. Social relations that are rooted in a fundamentally unequal class structure, in other words, find expression in law only if, and to the extent, that the existence of that class structure can be denied/obscured and given expression in a form consistent with the assumptions of freedom and equality inherent in the market. The result is a contradiction, internal to legal discourse, between the particular image of the world it presupposes, and which it must reinforce, and the socio-economic realities which constantly threaten to undermine it.[[31]](#footnote-31)

On the one hand, this implies that law, and labour law cannot completely deny inequality and exploitation, for to do so would be to sap the legal system of legitimacy, casting doubt on the equality and freedom that are integral to the market. But nor can they directly engage with the class structures that give rise to that inequality and exploitation, for this would be to reveal the illusoriness of the ‘equivalent’ exchange. Labour law not only mediates the struggle over surplus and subsistence with a view to securing the material conditions for surplus value production, then, but also, in order to secure its *cognitive* conditions, to uphold the particular set of beliefs about the world on which surplus value production, and its own legitimacy, depends. Its ability to appear *as* a logic counter to capital accumulation, to present itself as a means for limiting exploitation, rather than actively supportive of the structures that give rise to that exploitation, is thus essential to the function that capitalism, and by implication, its legal form, must perform.

Labour law must not only, as a matter of material necessity, keep exploitation within sustainable limits, then, but so too must it *appear* as a weapon *against* capitalism, as a means through which the formal freedom and equality presupposed by law can be realised in practice. If critical labour law scholars do not take seriously how capitalism itself presents labour law in a particular way, then, they risk losing their critical edge - interrogating their own conceptions of labour law, and engaging reflexively with the limits of labour law as a means for structural emancipation.

***5. CRITICAL LABOUR LAW SCHOLARSHIP: PRACTICAL CONTRIBUTION***

The above analysis reveals the contradictory nature of the role that critical labour law scholars play; pursuing a political agenda of worker emancipation - *ending* capitalistic exploitation - but doing so by way of a mechanism, labour law, whose social function is to perpetuate and reproduce that exploitation and its constitutive structures. This raises the question as to whether critical labour law scholarship should even be concerned with improving the effectiveness of labour law, with pursuing practical programmes for labour law reform *in the short-term*, given that in doing so they are potentially inhibiting their longer term goal of undermining capitalism, (and by implication *law*) entirely.

In responding to this question, the insights of Karl Korsch are once again important. Korsch was well aware of the contradictory role of labour law, and was highly critical of programmes for reform which, by focusing on improving the terms and conditions of work, implicitly accepted, and thereby helped perpetuate, the basic structures through which exploitation proceeds.[[32]](#footnote-32) The problem with such an approach was that it effectively undermined the long term goals to which the ‘labour movement’ was committed. Despite this, Korsch did not deny the *importance* of such ‘social policy’ reforms, of intervening in these more short-term public political debates, for he saw them as essential for providing the foundations for a more ‘transformative’ political agenda, an agenda which, he believed, labour law could itself help to achieve.[[33]](#footnote-33)

In this respect, Korsch made an important observation. The day-to-day struggles over surplus and subsistence, over wages and working conditions, that form the central focus of political debates about labour law reform, must be treated in a cautionary way because they presuppose the capitalist system. Fixating on these struggles on their own terms, and thus, accepting the terms of the legal and political debate, risks precluding the transcendence of the system that causes these problems in the first place. This does not, however, mean that such reform efforts, and thus, these struggles, should be ignored: it is only if labour law places limits on exploitation, and thus, only if it effectively mediates the struggle over surplus and subsistence, that workers will be in a position to advance political programmes for more progressive change in the future. Improving the effectiveness of labour law is *itself* an important goal, therefore, because without it, no form of co-ordinated political action (on behalf of the working class) would even be possible. As Marx argued ‘by cowardly giving way in their every conflict with capital, they [the working class] would certain disqualify themselves from initiating any larger movement’.[[34]](#footnote-34) The task, then, is to make a tactical intervention in these every-day struggles, into public political debates about labour law reform, in a way that is framed, and directed, by the wider strategic goal of bringing about structural change.

These observations suggest, first, that critical labour law scholars should use their critical theoretical position to help shed light on the structural *causes* of the problems that labour law is being called on to address, to shed light on the limits that exist on labour law’s capacity to address them, and thus, to provide guidance about how to intern in concrete cases, and debates about labour law reform, in a way that might help resolve these short-term challenges, but do so in a way that does not undermine their longer-terms, structural, objectives. How this might be done will now be illustrated using the example of the ‘debate’ about labour law’s personal scope.

*5.1 LABOUR LAW’S SCOPE*

There is a consensus, within the labour law community, and indeed within wider society, that current approaches to labour law’s personal scope are problematic. In general, the consensus seems to be that labour law is under-inclusive, that those thought deserving of labour law’s protection, tend to fall outside the full scope of that protection in practice. The rest of this article will use critical theoretical position developed above to *clarify* this debate, better explain the reasons for the apparent problem, and to explore the limits, and potential, of overcoming those problems through legal and/or labour law means.

The first step in this process is a clarification of the problem: what does it mean to say that labour law is under-inclusive? Consistently with the functional perspective adopted thus far, we can say that labour law’s effectiveness, when conceived from within the lens of its socio-economic function, necessarily depends on its capacity to apply the principles and rules historically developed to perform that function, to all those working relations to which that function is relevant: working relations characterised by the ‘struggle over surplus and subsistence’ analysed above, and thus, the distinctly capitalistic form of exploitation. Thus, while it is perfectly possible for legal systems to extend the application of particular labour law norms to other groups, (as has historically been the case with other working relations that create risks of other forms of exploitation, such as domestic service relations), and/or for labour law norms to come to be applied to a wider range of working relationships as a result of historical contingency, labour law’s core sphere of concern are *legal* relations between organisations, funded by accumulated capital (whether it be public organisations funded out of surplus value appropriated by the state via taxation, or private organisations funded out of accumulated profits) and the wage-dependent persons whose labour they purchase in the labour market with a view to extracting surplus from them in the production process.[[35]](#footnote-35) This suggests that statutory criteria for employment status, and thus the juridical ‘tests’ or ‘approaches’ to employment status developed to give effect to them, ought to be informed by an analysis of the worker’s class position, and the social function of his work - the structural context which explains *why* the relationship between the parties came to be.

In practice, of course, this is not an accurate description of legislative, or judicial, definitions and criteria for the application of labour law. In what follows, we will see how our critical understanding of labour law can help us distinguish between the historical reasons for this, and the *structural* reasons - that is, those reasons attributable to the particular influence that the juridical form has on the way in which social problems, and working relations, are conceptualised, and expressed, in law.

5.2 **THE HISTORICAL EXPLANATION**

One of the reasons behind labour law’s approach to its scope is historical.[[36]](#footnote-36) As Karl Renner observed in *The Institutions of Private Law and Their Social Function,* legal institutions come to perform particular functions as a result of the wider social context in which they come to be, and the legal-institutional environment in which they exist.[[37]](#footnote-37) To understand how, and why, a particular conception of the contract at the heart of the capitalist work relation became so central to juridical conceptions of dependent wage-labour, therefore, a functional analysis will not suffice; we must have regard to the specific historical circumstances in which that conception emerged, and the wider legal institutions with which it came to be linked.

The system of labour and social protections that is commonly associated with labour law emerged in a particular socio-historical context, a context in which the majority of capitalist work relations assumed a particular form, (the legal expression of the Standard Employment Relationship),[[38]](#footnote-38) a relationship which was itself profoundly shaped and structured by the legal form of the contract of employment on which it was based.[[39]](#footnote-39) This legal form was conducive to the dominant profit strategies of the era, based as it was on vertical integration, mass production, and centralised, direct, managerial control over the workforce.

In many respects, it is through the legal form of the contract of employment that labour law came to perform, more or less adequately, (and only in relation to those working relationships to which it applied), the mediating function described above.[[40]](#footnote-40) By linking certain legal rights and obligations to a particular form of working relationship, labour law sought to secure, simultaneously, the long term health, and well-being of workers throughout their lifetime; and, at the same time, a reliable, and co-operative, labour force to capital. In effect, it facilitated the exploitation of labour power by capital, but did so in a way that was more or less, socially and economically sustainable. In so doing, labour law profoundly shaped policy-debates, and socio-economic practices. By projecting a particular normative model of what work in capitalism *ought* to be like, and the sort of rights and obligations to which it *ought* to give rise, moreover, labour law profoundly shaped how the capitalist work relation developed, and, in turn, how labour law’s role in relation to it came to be conceived. Significantly, then, it provided mechanisms for regulating the relationship between individual workers and firms that would, at the societal level, help uphold workers’ living standards, while providing an environment conducive to accumulation.[[41]](#footnote-41)

While the tests and concepts developed to identify and conceptualise the employment relationship have their origins prior to the emergence of the SER, it is to this specific, socio-historical, and institutional, context to which they are adapted.[[42]](#footnote-42) Of course, given that the SER *is* a particular manifestation of the capitalist work relation, the factors associated with it in law *do* allude to certain of its distinguishing features. There is no doubt, for example, that the fact that many work relations depend on a contractually underpinned power of control reflects the need (in many contexts), by firms, to control the labour process in order to intensify work, and thus, maximise the surplus extracted. The problem, however, is that these factors associate those features with just *one* of the capitalist work relation’s many possible forms. While these factors may indeed be adequate proxies for the distinguishing features of the capitalist labour relationship, as they manifest in a particular socio-legal context, they will prove inadequate as features of that context - the organisation of production, the development of new sectors, and/or institutional changes - evolve.

5.3 **THE STRUCTURAL EXPLANATION**

The critical theoretical position developed above allows us to identify a second, and often under explored, reason for labour law’s approach to its scope. This relates to the particular way in which the legal form structures social relations, the way in which social relations are conceptualised, abstracted, and decontextualised, in law.

The analysis of the legal form above suggests that the prevalence and ubiquity of commodity relations in capitalist society is paralleled by the ubiquity, and pervasiveness, of the juridical; of a particular ‘juridical’ world view. This particular world view *frames* not only juridical interpretation, and thus, the attitudes, and decisions, of the courts; but also, political debates, and ultimately, ‘legislative’ interventions. By implication, then, it has a profound effect on how dependent labour relations, the subject matter of labour law, are conceptualised; as well as the criteria developed by reference to which to identify them. Not only this, but the requirement for consistency in juridical discourse, and thus, its self-referential mode of evolution, tends to constrain how well the law can adapt to changes in its social and economic context, and thus, how well these conceptions and tests will shift and evolve over time. Even as the context in which different types of work is performed changes, therefore, and new spheres of activity are subsumed within the sphere of capital accumulation, it is difficult for the law to recognise how changes in the social function, and structural context, of the work, might alter the analysis when it comes to matters of scope.

Relatedly, because the law can only ‘see’ labour relationships in the form of a legal relation between subjects, it struggles to identify economic dependence, subordination, control - all those factors associated with dependent labour - if those features are not apparent from, or cannot be given expression through, the parties’ agreement. Law is both too abstract, and too specific, to engage with the structural origins of the social problems it is called upon to address, and thus, the particular features that distinguish capitalist working relations from other arrangements for work or services. Because law frames people as abstract, isolated, individuals, it creates their actions, rather than the reasons or causes of their actions, as decisive.[[43]](#footnote-43) As a result, attempts to intervene in particular disputes, and engage with specific problems, never actually touches on the logics that shape and condition their actions. In effect, the legal system’s own (historically evolved) conception of the subject matter of labour law, of capitalist work, is abstracted from the very structures which lend it its distinctive features.

These observations perhaps help us understand the centrality of the contract of employment to juridical conceptions of capitalist work. One of the significant features of this contractual form (the legal form associated with the SER) is not merely its ‘fit’ with the dominant business strategies, and prevailing socio-economic and political climate, of the era, but also, its ability to reconcile, however imperfectly, the freedom and equality presupposed by the market, and the inequality and subordination inherent in the resulting working relation. This it does by expressing *class* dependence and *class* control as a *contractual* dependence by an individual worker on an individual firm for his/her contractual wages, and a power of control, exercised by capital, pursuant to a contractual obligation on the worker to work and a legally implied duty of co-operation and obedience.[[44]](#footnote-44) By expressing the by-products of *structural factors* as the product of the parties’ agreement, however, the law is simply insufficiently nuanced to identify, and distinguish, capitalist work relations from other relations with which the legal system is confronted.

The law’s focus on the parties’ agreement does, of course, generate risks of abuse: attempts by firms to draft contracts with the express goal of negating the existence of those features - contractual obligations to provide personal work, contractually mediated forms of subordination and control, etc - associated in law with dependent labour. The problem with framing such actions as abusive, however, is that it implicitly reinforces the idea that there is a true, *legal* definition of employment that is being ‘illegitimately’ subverted. Such an argument does not dispute the legal conceptualisation of dependent labour, therefore, but simply how this notion is applied to a specific case. It is ultimately this critique that has led to calls by labour law scholars, and judges, for the courts to take a more ‘purposive’ approach to contract interpretation, to infer the terms of the parties’ agreement from all the circumstances, rather than focusing solely on the written wording. The problem, however, is that this sort of critical ‘intervention’ is unhelpful: by implicitly accepting the terms of the debate, accepting that employment status is a function of the parties’ *agreement,* such interventions actually reinforce, and help perpetuate, the very mode of legal argumentation that *inhibits* labour law’s effectiveness in practice.[[45]](#footnote-45) While this approach may well have enabled the courts to bring within its scope a number of working relations which might otherwise have been excluded, it does not in any way overcome the *reason* why such an intervention was necessary in the first place, nor does it *challenge* the overall approach, namely, of focusing on actions, decisions, and outcomes, *rather* than the structures which ultimately explain, and give rise to them. Rather than challenging, and exposing the effects, of the legal form, then, such an approach implicitly legitimises and reinforces it.

A more critically oriented intervention would instead seek to highlight the *inadequacies* not only of the particular way in which statutory definitions, and common law tests, are applied, but the very assumptions on which the exercise itself proceeds. It might, for example, seek to highlight how the legal form *itself* systematically excludes certain groups from the scope of labour law, and explain *why* this is problematic, by exposing the *structures t*hat justify the application of labour law to those groups in practice.

In this spirit, the next section will use two examples to illustrate the *systemic* limits to labour law’s capacity to align its scope and function: that is, it will be explain how the legal form itself operates to exclude the following two groups, and *why* this is problematic from the perspective of labour law’s function. The first example is forms of work where the production process is temporally prior to the conclusion of a contract between a particular worker and firm, such as in forms of predominantly ‘mental’ work where workers do not need access to any specific means of production to produce, but nonetheless rely on capital in order to commercially exploit their work; and the second example is casual work, where the effects of competition alone can often suffice to secure control over labour, without the need for any contractual obligations to work, and/or any contractual power of control.

6. A CRITICAL INTERVENTION IN DEBATES ABOUT EMPLOYMENT STATUS

*6.1. Creative Work*

A good example of the first situation is the above noted relationship between a wage-dependent author, dependent on their writing for subsistence, and the publisher to whom the manuscript (or rather, copyrights) is eventually sold. In this context, adapting one’s writing to the preferences of publishing firms is an absolute prerequisite for being able to access the means of subsistence, because it is only if a publishing agreement can be secured that it will be possible to earn an income from the work. In effect, this means adapting one’s labour to the demands of the consumer market, producing ‘what sells’, rather than engaging in genuinely autonomous literary production, - adapting one’s work, in other words, to that which helps boost publisher profits.

Given the extent of competition between budding authors when it comes to securing a publishing agreement, writers have no choice but to accept the payment arrangements (royalties) and copyright agreements, that the publishers offer, in effect, ‘bidding down’ the price of their labour. The economic pressures to which authors are subject effectively compels them not only to adapt the nature of their work to (what they believe to be) publishers’ preferences, then, but also to intensify their labour process, to spend time on researching, revising, self-promotion etc, and potentially depressing pay, all with a view to increasing their chances of getting published. The moment that a publisher concludes a contract with such an author, the surplus produced by that worker - extracted as a result of the wider class structures through which the work is performed - can be captured by that firm, notwithstanding that that particular firm exercised no *direct* control over that particular author’s labour process.[[46]](#footnote-46)

The struggle over surplus and subsistence is clearly present here; the labour process is subject to the social control of capital, the benefit of which can be captured by individual firms by means of a ‘free’ contract, even though the labour process itself takes place before the contract is concluded. Because the power manifests at the level of what the courts refer to as ‘commercial pressures’, rather than the level of legal obligations, however, these relations defy straightforward labour law (or juridical) analysis; while these relations are characterised by the capitalistic form of exploitation, the features of control, dependence, and subordination legally associated with such exploitation are simply not manifest, or visible, from the parties’ agreement, or even, from the relationship that develops between them. They are not, then, amenable to be given expression at law.

These problems are not unique to author-publisher relations, although they are particularly prevalent in the context of the creative industries.[[47]](#footnote-47) In this context, direct managerial, forms of control are not only unnecessary, but also, obstructive, to firms’ objectives, because firms rely on the ‘autonomous creation’ of their workers to produce the unique and distinctive creative goods that consumers want to buy.[[48]](#footnote-48) Given the high numbers of persons seeking an outlet for creative works, moreover (given low costs of production), firms need not worry about an under-supply of labour. There is thus no real reason for them to hire them directly. Partly as a result of this, creative work appears qualitatively different from the majority of capitalist work relations, particularly manufacture and service work: not only is it often social and collaborative in nature, but it is often seen to allow for a form of self-expression and autonomy that is absent from conventional understandings of work, or employment. And yet, with the growing ‘commodification of culture’,[[49]](#footnote-49) creative work is increasingly being harnessed by capital to serve the ends of accumulation.

The rise of large multi-media conglomerates has meant that it is extremely difficult for individual creators (journalists, authors, singers, artists) to earn a living from ‘creative work’ without adapting their creative processes to the preferences of the large capitalis firms on which they depend to access consumers - to find anoutlet for, and commercially exploit, their works. As such, the social power of capital is able to influence their creative processes - and is able to do so *before* any contract is even concluded. This is problematic for labour law because, at the moment when work is performed, no firm is under any obligation to pay for it, and no worker is under any *legal* obligation to produce it. Any ‘obligation’ to create is purely structural, or, in the words of the court, ‘commercial’. Thus, as the court in *Writers Guild of Great Britain v BBC[[50]](#footnote-50)* concluded,in the context of relationship between media companies and those writing material for them, there is no contract for work, but merely a contract for the sale of a finished article. In this particular case, that conclusion meant that authors who submitted unsolicited scripts to the BBC were not workers or employees because ‘they do not undertake to do anything’ and the only obligation on the BBC was to pay fees when the work is accepted and broadcast.[[51]](#footnote-51)

As the *Writers Guild* case illustrates, free-lancers and other creative workers are rarely paid for the time expended on producing a particular good, but are paid by output: per article, per song, or per film, etc. They are not in a position to charge high prices for their creative products, however, because, with the market for free-lance work over-stocked (itself a product of publishers’ preferences for free lance work), they tend to bid-down the price of their own works. The wider economic, and institutional environment in which free-lancers operate is such, then, as to compel them to intensify their work processes, and adapt those processes to (what they perceive to be) firms’ preferences, without the need for those firms for direct contractual mechanisms of control. In effect, the wider class structure, and the particular socio-institutional environment, is such that firms are able to obtain from creative workers, at low cost, high quality ‘creative goods’, relying on them to adept their creations to the tastes and needs, of publishers (and thus, the demands of the market), without the need for any contractual obligation to work, or contractually-mediated form of control.

Indeed, the court in *Writers Guild* actually recognised that ‘the BBC’s sole source of supply are ‘independent authors’ and that ‘“fortunately” there seems to be great enthusiasm for this type of writing and the BBC receives about 10,000 unsolicited scripts a year. About 480 of these scripts are eventually accepted for broadcasting, but before this stage is reached the scripts, as submitted, have usually been revised and improved as a result of suggestions made by the staff of the BBC.[[52]](#footnote-52) Rather than recognising that this situation described a structural power imbalance that profoundly influenced the terms of the exchange between the writers and the BBC, however, establishing the terrain on which a struggle over surplus and subsistence could play out; the courts relied on this observation as evidence that the BBC would not *need* to directly procure work. In other words, the contract made perfect business sense, and so the court did not need to *imply* an obligation to work to give business efficacy to the arrangement. As such, there was no contract *for* work, and thus, nothing to which labour law rights and obligations could attach. Because of this, the court was unable to contemplate that such a relation might nonetheless be analogous - in function - to ‘contracts of employment’.

*6.2. Casual Work*

The second example of a situation where the law’s requirement for *legal* obligations between juridical subjects is problematic, and thus, its focus on *interpersonal relations,* is in the context of ‘casual’ work. In this context, the courts persistently distinguish between a situation where ‘the company were undertaking to offer work to the regular casuals in return for the regular casuals undertaking to accept the work which was offered (i.e. a contract of employment) and [secondly] [the situation where] there was no contract to employ and that the arrangement was s*imply the consequence of market forces* (in effect, the dominant economic position of the company)[[53]](#footnote-53). As a result, in contexts in which firms can rely on the ‘disciplinary effects’ of the market to compel workers to work, there is a strong incentive for to rely on such extra-contractual compulsions, avoiding the ‘costs’ of statutory employment law, while reducing the *need* to agree legal obligations to work.

In some contexts, of course, extra-contractual compulsion is not sufficient if the firm is to maintain control over the quality of the work performed. In such cases, there may well be aspects of the agreement that reveal elements of control that the courts can draw upon in their assessment of the nature of the parties’ relationship. This was, in effect, what occurred in *Aslam v Uber.* Here, the courts placed considerable emphasis on the direct mechanisms of control that Uber exercised over workers, in particular, the control exercised via its App, regardless of the firms attempts to negate employment (or worker) status via the contract. Relevant too was the gap between the written wording, and how the parties conducted themselves in practice, allowing the courts to *infer* an agreement that could be taken to reflect the parties’ *real* intentions, and whose form was consistent with a worker contract. The problem, however, is that such approaches only take us so far. They would not assist, for example, in a case where any control that is exercised originates *out-with* the relationship between the parties, particularly in a context of an oversupply of labour, and/or a mechanised/generic production process where the firm really is indifferent to whether or not there is a *legal* obligation to work, and/or is relatively indifferent as to who, if work *is* performed, performs it, in practice.

To a certain extent, this was the sort of situation at the heart of *Quashie v Stringfellows’ Restraurants.[[54]](#footnote-54) Quashie* was a lap-dancer who sought to earn money by lap—dancing in the defendant night club. In this case, as is common in the industry, the night club agreed to allow Quashie to dance for its clients, in exchange for a fee, payable by Quashie, and deducted by the club from the income she received from the clients. This income was paid in the club’s currency (‘heavenly money’), and so, had to be cashed in at the end of the night with management; it was at this point that the fee was deducted, and any further deductions, or fines, imposed.

One of the central questions in the case was whether Quashie was an employee for tax and employment law purposes. The ET and the Court of Appeal held that she was not, the latter arguing that there was no *legal* or *contractual* obligation on the dancer to work. She was (within certain boundaries) free to dance, or not dance, for the club’s clients as she pleased, even though the club did exercise some control over how she danced, when, and the terms on which she did so.[[55]](#footnote-55) While the tribunal accepted that she, and other dancers, feared that they would no longer be allowed to work in the club if they sought to work elsewhere, this did not amount to a *legal obligation* to work.[[56]](#footnote-56)

In many industries, firms offer their clients, or customers, a package of inter-related, and complementary services, with a view to distinguishing themselves from their competitors. Thus, a golf club might provide access to a golf course,[[57]](#footnote-57) but it might also offer specialised training sessions and/or a caddying service; or, as in Quashie, a night club might provide a basic service to consumers, a bar, a place to dance etc, but might also decide to offer lap-dancing to those consumers interested in ‘boosting’ their experience. In some contexts, these ‘bonus services’ are only attractive to consumers because, and to the extent that, they are offered *in conjunction* with other core business - there is little point in hiring a golf caddy outside the context of a gold club; lap-dancing is only attractive if it takes place in the specific context and environment of a night club etc. In other contexts, the emergence of multi-service firms simply cuts off opportunities for independent producers/service providers to access the consumer market, for these large firms can offer these ‘ancillary’ services at low price, subsidising them with profits from their ‘core’ business activities.[[58]](#footnote-58) The result is that individuals engaged in these occupations - lap dancers, golf caddies and other personal service providers - become dependent on the larger ‘service’ firms for access to the means of subsistence. As a result, these firms can take advantage of this dependence to extract a surplus from these workers; not only are these ancillary services less important to the firm than its core services, increasing its bargaining power (because the worker is not ‘integral’ to its core business),[[59]](#footnote-59) but to the extent that the market is monopolised by a few large firms, competition between service providers can be relied on to depress pay.

Lap dancing is not really something you can provide as a stand-alone service, or at least, not without considerable difficulty, and risk. By linking Quashie’s pay with the tips received by customers, but deducting from those tips various fines, and charges, including a commission, the club ensured that it could keep the costs of her work lower than the value of that work, to the club. This benefit came, indirectly, through the added popularity of the club among its customers, the increased likelihood that they would remain in the club, purchasing drinks etc, and would return to that club in the future.[[60]](#footnote-60) While the court of appeal argued that there was no wage-work bargain, then, because the club did not agree to pay her anything at all, the reality was that the club adopted a pay system that allowed it to exercise indirect control over the dancer, and the intensity of the work, so as to secure a surplus.[[61]](#footnote-61)

The problem for the court was that what compelled Quashie to work, and work more, and in a way adapted to the demands of the customers, was not a contractual obligation to do so, or a direct order by an employer, but the social power that capital exercises over all those dependent on capital for access to subsistence, and the particular way in which this social power operated in the context of an industry in which (1) earning opportunities were effectively foreclosed by the dominant position of night-clubs, (2) those clubs provide integrated services that generate possibilities for cross-subsidization, undercutting smaller competitors, (3) competition between dancers reduces labour supply issues and encourages dancers to ‘self-exploit’, and (4) tip-based payment systems allow firms to control work quality by helping them adapt their performance to the tastes of customers, such that night clubs could avoid direct mechanisms of employment, to control the labour process in such a way as to ensure a surplus.

In *Quashie* the reality of the situation really was that the dancer was obliged to pay the club to earn money by dancing for its customers, an arrangement which, on the surface, appears no different from that which would be agreed between independent businesses each seeking to generate a profit. But the agreement itself could not tell the court *why* such an arrangement was adopted, nor the socio-economic function of the work performed. The problem here was not (or not only) the way in which legal definitions of employment were applied, but wit h the law’s own construction of socio-economic relations and its blindness to structural causes.

Dancers like Quashie have no choice but to pay the club to dance because this is the arrangement on offer by the nightclubs in which lap dancing services are offered, and which, as a result, monopolise the consumer market.[[62]](#footnote-62) The club did not offer to directly employ Quashie, because it did not need to in order to profit from her work, and, arguably, could generate more profit by simply manipulating the pay system.[[63]](#footnote-63) Provided it could control how much she was paid by the customers, and could appropriate a proportion of that sum that was lower that the value to the club of having her dance there, direct employment was simply unnecessary (and costly).[[64]](#footnote-64) This ‘outcome’ can only be adequately explained by reference to the structures in which work agreements are concluded, and this is simply not something which is cognisable in law.

Beyond certain limited requirements, Quashie had no *contractual* obligation to work. Nor did she have any *contractual right* to be paid. Through the juridical form, however, this situation was understood not as an expression of her extreme dependence on the club, and the latter’s market power, but as a free decision to *assume* economic risk herself. In effect, the juridical form *inverted* a relationship of extreme dependence, in which the social power of capital effectively guaranteed the latter’s surplus *into* a commercial agreement between autonomous subjects where the dancer *voluntarily forego* a right to a guaranteed minimum amount of work, and/or payment, in favour of the opportunity to make a profit.

The issue here is not the courts’ failure to move beyond the formal contractual wording, to observe the way the parties’ conduct themselves in practice, for the relationship *was* one of (legally conceived) self-employment; Quashie really did have no contractual obligation to work, and she really did have no contractual *right* to be paid. An ‘intervention’ into this debate that simply argues that Quashi *is* an employee, and should have been recognised as such, fails to appreciate the problems inherent in the employee concept, and the factors to which it is related, itself. A more productive intervention would emphasise instead that, through the lens of the juridical form, the existence of *de facto*  obligations, a product of the economic pressures imposed by the market, and the imbalance of power between Quashi and the club, were obscured, or rather, discounted as irrelevant to the *legal* question at hand. The wider circumstances in which the arrangement between the parties were concluded was simply not relevant to the analysis of their *relationship*, and it is the analysis of their relationship that remains central to law. The problem then becomes *not* the precise tests used, or the approach taken to contract interpretation; the problem is one that is inherent, and implicit, in *law* itself.

*7. IMPLICATIONS AND CONCLUSIONS*

The above analysis demonstrates how our critical theoretical position might inform interventions into debates about labour law reform in a way that *does not* simply legitimise, and reproduce, the structures which it is our ultimate objective to change. Before exploring the implications of such a technique in more detail, it is worth qualifying the above analysis in two ways.

First, critical labour law scholarship has long recognised that the socio-economic and legal context in which contracts for work are concluded, while it may not alter the social function of the contract, *does* influence its precise socio-economic, and thus, empirical, implications. Thus, it is one thing to conclude that the legal form systematically excludes certain relations from its scope, and quite another to understand the concrete socio0economic implications of such exclusion in different contexts.

Take, for example, the case of creative work noted above. While it is true that the temporal gap between the labour process, and the conclusion of a contract between an individual worker and firm, prevents the courts recognising and engaging with the mechanisms by which capital’s social power is exercised in this context, encouraging workers to ’self-exploit’, the ability for firms to rely on ‘self-exploitation’ - on extra contractual forms of labour control - is largely attributable to the wider context in which creative work is performed today: the sheer numbers of creators competing to find an outlet for their work; the domination of the market for creative goods by a small number of multi-media firms, reducing creators’ bargaining power; and the lack of any alternative institutions - such as sector-wide collective bargaining - capable of guaranteeing creators minimum sums, or royalties, for their works. That is not to say that creative workers do not fall within labour law’s sphere of concern - conceived from a functional perspective - but it is to suggest that the negative implications of their exclusion from labour law might be minimised were wider institutions reforms - such as reforms to copyright law, and/or competition law - introduced.

Similarly, if we return to the problem of casual work, and the case of Quashie in particular, it is clear that the lap-dancing’s club ability to rely on extra-contractual pressures, and thus, its ability to forego a *contractual* obligation to work, was profoundly influenced by the wider economic, and legal, environment in which the work took place. In a context of widespread collective bargaining, closed shop arrangements, comprehensive social insurance, and restrictions on monopoly, the extra-contractual pressures on workers, while still present, might nonetheless be diminished. Not only would this encourage firms to adopt more stable employment arrangements, but it would also minimise the negative implications of casual work for the workers concerned.

The second observation concerns the role, or potential role, of addressing these ‘problems’ via legislation - whether by modifying statutory definitions, legislating for the express inclusion of particular groups, and/or pursuing wider institutional reforms so as to minimise the negative implications of labour law’s exclusionary effects.

In thinking about this issue, we need to take seriously that policy-making, and political debates, are not ‘external’ to law, but are enacted, and conducted on, juridical terms. That is, as we saw above, the immanence of the juridical form in the practices of capitalist society is such that its essential assumptions tend to be internalised, and naturalised - taken for granted when social and legal problems are identified, and solutions to those problems posed. As a result, the legal form does not operate solely in the minds of judges, but also, at the level of the general social consciousness, influencing political debates, policy-proposals, and ultimately, legislative drafting.

A good example of how the legal form frames legislation and policy-making can be seen from the Government’s Taylor Review, a review which concerned itself *directly* with prevailing juridical approaches to employment status.[[65]](#footnote-65) While recognising that prevailing approaches appeared inadequate in the context of an increasingly casualised labour market, the focus of the critique was the lack of *clarity* surrounding the factors that the courts will take into account, and the relative weight that will be accorded to each. The reason this was problematic, it was argued, was because this lack of clarity made it difficult for firms, and workers, to structure their relationships in a way that would be consistent with their ‘choice’ as to employment status - as to whether, and if so, which, employment rights and obligations would arise.[[66]](#footnote-66) Implicitly, then, the review accepted the premise that employment status is a function of the *inter-personal relationship* to which employment rights attach - and not the wider context in which that relationship comes to be. As a result, the policy-proposals that came out of the review - such as clear, legislative definitions and criteria for employee and worker (or dependent contractor) status, simply would not address the fundamental challenges arising as a result of the juridical form: the *individualistic* or rather, interpersonal focus of legal discourse, and its failure to engage with the *structural* causes of exploitation.

The above observations would apply not only to attempts to modify the scope of labour law via legislation, but also, to attempts to improve the relative position of excluded groups via wider institutional reforms. This is because, in order to be perceived as legitimate, such reforms would have to be justified in a way that makes sense through the lens of the juridical form. In order to defend policy proposals for minimum royalty arrangements, for example, and/or mandatory terms concerning control of copyright, it would be necessary to *explain* why creators should be treated as an economically inferior group, to explain why it is legitimate to confer on them particularistic protections. And this is not something that can be done *on legal terms*. Garnering support for such proposals will thus require not merely a recognition of the structural position of such workers, and thus, their socio-economic status, but also, an explanation of why this position and/or status has not previously been recognised in law.

Unless critical scholars can bring to the heart of public debates the *effects* of the legal form on juridical conceptions of employment, and can explain, and demonstrate, how the law abstracts and decontextualises social relations - gaining support for any of the above types of legislative intervention will be difficult.

When thinking about how to intervene constructively, therefore, it is extremely important that critical labour law scholars *problemtise* the terms on which political debates take place. Unfortunately, this is not how most labour law interventions have tended to proceed. Take, for example, the proposal of Hepple to focus not on the common law notion of the contract of service, but the notion of employment relationship broadly conceived. In making this proposal, Hepple does not challenge the legal form, but reinforces it, arguing that‘[the] relationship should *of course,* be based upon voluntary agreement *between the worker and the undertaking to work in return for pay.* The insistence on agreement makes it appropriate to describe this as a contract rather than a status’. The centrality of the contract, or rather, the particular conceptualisation of that contract, may be challenged, then, but Hepple is accepting the ‘juridical’ lens through which employment status questions are decided: the lens of the parties’ *agreement.* Even those, such as Langstaff, who have used more porous concepts such as the work *arrangement,* do not question the centrality of the inter-personal relation, rather than the structures that give rise to that relation, to the status question.

In order to overcome the limits of such interventions, critical labour scholars need not only to politicise debates about labour law reform, to bring an analysis of capitalist class structures to the heart of these debates, they *also* need to place at the heart of those debates a discussion of the abstracting, and decontextualising, role of law. Both approaches must be pursued simultaneously: in the words of Joanna Kusiak, scholars need to start thinking both inside, and outside, the law, at the same time, while, at the same time, framing (whether explicitly, or implicitly) their legal and political arguments in light of the broader goals they hope to achieve. They need to take a dialectical approach, pressuring the contradictions between the political ends they hope to pursue, and the legal form through which they attempt to pursue it, while recognising, and exposing, the tendency for distortion of the former by the latter.[[67]](#footnote-67)

In addressing the challenge of labour law’s personal scope in particular, then, and when thinking about how to intervene in this short-term struggle for labour law reform, critical legal scholars must have their wider objectives in mind; they thus must take care not to engage with law *on legal terms*, accepting the terms of the debate as they find them. They must not, for example, argue simply that Uber drivers *are* workers, or *are* employees, but should instead expose the complex, structural reasons why they may not; exposing the inadequacy not only of the legal reasoning *in particular cases*, but in general. To do otherwise, to accept the terms of the debate, is to risk perpetuating the very concepts, tests, and structures, that not only perpetuate exploitation, but which also operate to systematically exclude certain of those groups to which labour law’s own function is relevant.

Moving forward, critical scholars need to explore how to give *juridical expression* to class, or structural, forces; while exposing and explaining the *failure* of the law to engage with those class, or structural, forces in practice. In order to do this, documenting, and analysing, the law’s distortions, and exploring how these distortions influence particular cases and aspects of doctrine - as this article has begun to do - will be vital; it is only if we can better understand, and engage with, the ways in which the law constructs, and structures social reality beyond the law - including structures of exploitation - that we will be able to embrace the law as a means through which to change it.

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2. . For a background to this strand of critical labour law scholarship, see: Ruth Dukes, ‘Critical Labour Law: Then and Now’, *Research Handbook on Critical Legal Theory* (Edward Elgar Publishing 2019); Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford Monographs on Labour La 2014). [↑](#footnote-ref-2)
3. . Eg. Sinzeimer often spoke about ‘emancipating’ the worker, rather than simply improving terms and conditions of work. See: Dukes, *The Labour Constitution* (n 2) 3. [↑](#footnote-ref-3)
4. . Simon Deakin, ‘Labor Law: The Pragmatist’s Guide—Comments on A Purposive Approach to Labour Law’ (2017) 16 Jerusalem Review of Legal Studies 28. [↑](#footnote-ref-4)
5. . For a similar perspective, see the notion of regulatory dilemmas identified in: Eric Tucker, ‘Renorming Labour Law: Can We Escape Labour Law’s Recurring Regulatory Dilemmas?’ (Social Science Research Network 2009) [↑](#footnote-ref-5)
6. . This approach is also developed in: Sheila Cohen, ‘The Labour Process and Class Consciousness’ <http://oro.open.ac.uk/18868/1/pdf158.pdf> accessed 6 January 2020. [↑](#footnote-ref-6)
7. . . Thus, while it is a clear problem that many labour and social protections apply only to those workers who can prove a minimum period of continuous service with a single employer, this issue is not directly addressed in this article. [↑](#footnote-ref-7)
8. . This is similar to the notion of the ‘labour constitution’ found in the work of Sinzeimer. See: Dukes, *The Labour Constitution* (n 2). [↑](#footnote-ref-8)
9. . Renner (n 9) 295. [↑](#footnote-ref-9)
10. . See: Stephen A Resnick and Richard D Wolff, *Knowledge and Class: A Marxian Critique of Political Economy* (University of Chicago Press 1989). [↑](#footnote-ref-10)
11. . ibid. [↑](#footnote-ref-11)
12. . ibid. [↑](#footnote-ref-12)
13. . The significance of this point is only apparent when we move from Marx’s analysis in Capital volume 1, to his analysis in volume 3. [↑](#footnote-ref-13)
14. . Nancy Fraser, ‘Behind Marx’s Hidden Abode for an Expanded Conception of Capitalism’ [2014] New Left Review 55. [↑](#footnote-ref-14)
15. . For an excellent discussion, see: Giulio Palermo, ‘Power, Competition and the Free Trader Vulgaris’ (2016) 40 Cambridge Journal of Economics 259. [↑](#footnote-ref-15)
16. . Karl Marx, *Capital, Volume I* (Harmondsworth: Penguin/New Left Review 1867) Chapter 23. [↑](#footnote-ref-16)
17. . For a discussion, see the concept of exploitation developed in: Cohen (n 6). [↑](#footnote-ref-17)
18. . Palermo (n 15). [↑](#footnote-ref-18)
19. . ibid. [↑](#footnote-ref-19)
20. . Ibid. [↑](#footnote-ref-20)
21. . Marx (n 16) Chapter 10. [↑](#footnote-ref-21)
22. . A similar point is made by: Alain Supiot, *Critique Du Droit Du Travail* (Paris, puf 1994). [↑](#footnote-ref-22)
23. . Kosch makes this point in *What is Socialisation (*Was is Socialiserung), and in his discussion of the Factory Councils: Karl Korsch, *Was Ist Sozialisierung?: Ein Programm Des Praktischen Sozialismus*, vol 1 (Freies Deutschland Verlagsgesellschaft 1919); Karl Korsch, ‘Arbeitsrecht Für Betriebsräte (1922).’Each of these are discussed in: Patrick Goode, *Karl Korsch: A Study in Western Marxism* (Springer 1979). [↑](#footnote-ref-23)
24. Renner (n 9). [↑](#footnote-ref-24)
25. . Simon Deakin, ‘Evolution for Our Time: A Theory of Legal Memetics’ (2002) 55 Current Legal Problems 1. [↑](#footnote-ref-25)
26. . Robert Knox, ‘Marxism, International Law, and Political Strategy’ (2009) 22 Leiden Journal of International Law 413. [↑](#footnote-ref-26)
27. . Ibid. [↑](#footnote-ref-27)
28. . Richard Kinsey, ‘Marxism and the Law: Preliminary Analyses’ (1978) 5 British Journal of Law and Society 202. [↑](#footnote-ref-28)
29. . ibid. [↑](#footnote-ref-29)
30. . Karl Marx, *Critique of the Gotha Program* (Wildside Press LLC 2008) 53. [↑](#footnote-ref-30)
31. . Zoe Adams, *Labour and the Wage: A Critical Perspective* (Oxford University Press 2020). [↑](#footnote-ref-31)
32. . See the discussion in: Goode (n 23).and Korsch, *Was Ist Sozialisierung?* (n 23). [↑](#footnote-ref-32)
33. . ~ Umut Özsu, ‘“Exploitation, Marxism, and Labour Law”, by Alexis Cukier (Part Two) — A Translation by Joe Hayns and Pearl Ahrens’ (*Legal Form*, 9 December 2018) <<https://legalform.blog/2018/12/09/exploitation-marxism-and-labour-law-by-alexis-cukier-part-two-a-translation-by-joe-hayns-and-pearl-ahrens/>> accessed 1 June 2020. [↑](#footnote-ref-33)
34. . Karl Marx, Wage Labour and Capital and Value, Price and Profit (International Publishers, New York, 2006), at 61. [↑](#footnote-ref-34)
35. . In the public sector, such as those workers hired to produce public services, this ‘surplus’ takes the form of minimising costs, so as to reduce the burden on the public purse [↑](#footnote-ref-35)
36. .Judy Fudge, ‘Beyond Vulnerable Workers: Towards a New Standard Employment Relationship Special Section on Administering Labour Law - Papers from the Annual UWO Labour Law Conference: Part 1’ [2005] Canadian Labour & Employment Law Journal 151.. [↑](#footnote-ref-36)
37. . Renner (n 9). [↑](#footnote-ref-37)
38. . Zoe Adams and Simon Deakin, ‘Institutional Solutions to Precariousness and Inequality in Labour Markets’ (2014) 52 British Journal of Industrial Relations 779. [↑](#footnote-ref-38)
39. . Hugh Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 Oxford Journal of Legal Studies 353. [↑](#footnote-ref-39)
40. . Adams (n 31). [↑](#footnote-ref-40)
41. . Judy Fudge, ‘The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory’ [2017] Journal of Industrial Relations 0022185617693877. [↑](#footnote-ref-41)
42. . Simon Deakin, ‘The Contract of Employment: A Study in Legal Evolution’ [2001] Historical Studies in Industrial Relations 1. [↑](#footnote-ref-42)
43. . Knox (n 26) 430. [↑](#footnote-ref-43)
44. . Hugh Collins, ‘Market Power, Bureaucratic Power, and the Contract of Employment’ (1986) 15 Indus. LJ 1. [↑](#footnote-ref-44)
45. . Autoclenz Ltd v Belcher [2011] UKSC 41 [↑](#footnote-ref-45)
46. . For a similar analysis relating to freelance journalism, see: Nicole S Cohen, ‘Cultural Work as a Site of Struggle: Freelancers and Exploitation’ (2012) 10 tripleC: Communication, Capitalism & Critique. Open Access Journal for a Global Sustainable Information Society 141. While many author-publisher relations are mediated today by literary agent, this does not change the basic features of this analysis. [↑](#footnote-ref-46)
47. . ibid. [↑](#footnote-ref-47)
48. . Bill Ryan, *Making Capital from Culture, The Corporate Form of Capitalist Cultural Production* (Reprint 2010, De Gruyter 2010) [↑](#footnote-ref-48)
49. . Ursula Huws, ‘Expression and Expropriation: The Dialectics of Autonomy and Control in Creative Labour’ [2010] Ephemera: Theory and Politics in Organization. [↑](#footnote-ref-49)
50. . [1974] 1 All E.R. 574 [↑](#footnote-ref-50)
51. . . Writers Guild of Great Britain v BBC, [1974] I.C.R. 234, 244 [↑](#footnote-ref-51)
52. . . Writers Guild of Great Britain v BBC, [1974] I.C.R. 234,244. [↑](#footnote-ref-52)
53. . . O'Kelly v Trusthouse Forte Plc, [1984] Q.B. 90, 21 [↑](#footnote-ref-53)
54. . [2012] EWCA Civ 1735 [↑](#footnote-ref-54)
55. . At [50] – [56]. [↑](#footnote-ref-55)
56. . At [17] and [83] [↑](#footnote-ref-56)
57. . *Cheng Yuen v Royal Hong Kong Golf Club [1977] 3 LRC 414 (PC)* [↑](#footnote-ref-57)
58. . Zhijun Chen and Patrick Rey, ‘Competitive Cross‐subsidization’ [2019] The RAND Journal of Economics 1756. [↑](#footnote-ref-58)
59. . In [Aslam v Uber BV, 2016 WL 06397421](https://uk.westlaw.com/Document/I755A45D0A05A11E69B2C84B393DB96C1/View/FullText.html?originationContext=document&contextData=(sc.Search)&needToInjectTerms=False), at [95]*,* the ET suggested that the difference between an Uber driver, and Quashie, was that while the former was integral to Uber’s core business, the latter was not; she was performing a purely ancillary service. [↑](#footnote-ref-59)
60. . For a study on how wages and tips differently affect how well workers’ adapt their services to client preferences (in the sex industry) see:William Chapkin, ‘Power and Control in the Commercial Sex Trade’ in Ronald John Weitzer (ed), *Sex for sale: prostitution, pornography, and the sex industry / edited by Ronald Weitzer.* (Routledge 2000); Einat Albin, ‘The Case of Quashie: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work’ (2013) 42 Industrial Law Journal 180.. [↑](#footnote-ref-60)
61. . For a similar analysis, see: Albin (n 60). [↑](#footnote-ref-61)
62. . For an analysis of the conditions faced by lap dancers, see: Rachel Bell, ‘The Reality of Lap-Dancing, by a Former Dancer’ *The Guardian* (19 March 2008) <<https://www.theguardian.com/world/2008/mar/19/gender.uk>> accessed 5 March 2020. [↑](#footnote-ref-62)
63. . Chapkin (n 60) 185. [↑](#footnote-ref-63)
64. . Albin (n 60). [↑](#footnote-ref-64)
65. . Matthew Taylor, ‘Good Work: The Taylor Review of Modern Working Practices - GOV.UK’ <<https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>> accessed 30 May 2020. [↑](#footnote-ref-65)
66. . See the discussion in: Katie Bales, Alan Bogg and Tonia Novitz, ‘‘Voice’and ‘Choice’in Modern Working Practices: Problems With the Taylor Review’ (2018) 47 Industrial Law Journal 46. [↑](#footnote-ref-66)
67. . Kusiak, J. (forthcoming), ‘Trespassing on the Law: Critical Legal Engineering as a Strategy for Action Research’, *Area* (special issue on ‘Practicing Legal Geography’) [↑](#footnote-ref-67)